

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA  
WESTERN DIVISION**

**NUTRITION & FITNESS, INC.,**

**Plaintiff,**

**v.**

**THE WINNING COMBINATION INC.**

**and**

**KAIZEN NUTRITION, INC. NV,**

**Defendants.**

**Case No. 5:10-cv-00088-BR**

**CONSENT JUDGMENT AS TO DEFENDANT WINNING COMBINATION INC.**

Nutrition & Fitness, Inc. ("NFI") filed this action against The Winning Combination Inc. ("Winning Combination"), alleging that Winning Combination's use of the marks HERBALEAN and HERBALEAN FX constitutes infringement of NFI's registered mark HERBALEANE and unfair competition. In addition, NFI sought a declaratory judgment that it has not abandoned the HERBALEANE mark. Winning Combination did not timely answer the complaint, and NFI moved for entry of default against Winning Combination on June 25, 2010. NFI and Winning Combination, in order to resolve all of the issues between them in this litigation, agree upon the entry of this Consent Judgment.

NOW, THEREFORE, with the consent of NFI and Winning Combination, as reflected by their signatures below,

**IT IS ORDERED, ADJUDGED, AND DECREED AS FOLLOWS:**

1. This Court has jurisdiction over NFI and Winning Combination and the subject matter of this action, and venue is proper in this Court.

2. NFI is the owner of a registration for the mark HERBALEANE (U.S. Registration No. 2,024,834) ("834 Registration") for use with "herb and vitamin supplement" in International Class 5.

3. Winning Combination has filed intent-to-use applications to register the marks HERBALEAN (U.S. Serial No. 77/854,722) ("722 Application") and HERBALEAN FX (U.S. Serial No. 77/760,584) ("584 Application") for use with "herbal dietary supplements in capsule form for use in promoting weight loss, increased muscle mass, and increased energy" in International Class 5.

4. The Parties entered into a Settlement Agreement effective as of Nov. 30, 2010, 2010 ("Effective Date").

5. Within five (5) business days after the Effective Date of the Settlement Agreement, Winning Combination shall:

- (a) expressly abandon the '722 Application and '584 Application; and
- (b) withdraw its petition to cancel NFI's '834 Registration with prejudice (Cancellation No. 92051656).

6. Winning Combination, its officers, agents, servants, employees, and attorneys, and all persons in active concert or participation with them who receive actual notice of this Consent Judgment by personal service or otherwise, are hereby prohibited and permanently enjoined from:

- (a) With respect to the HERBALEAN and HERBALEAN FX marks, directing advertising, promotions, or offers for sale to the United States, or

selling, shipping, providing, or otherwise transferring possession of any goods or services under the HERBALEAN and HERBALEAN FX marks to consumers in the United States, whether via internet websites or otherwise; and

- (b) Applying to register the HERBALEAN and HERBALEAN FX marks in the United States.

7 To the extent Winning Combination advertises, promotes, or offers for sale any goods or services under the HERBALEAN or HERBALEAN FX marks on the internet, within sixty (60) days after the Effective Date of the Settlement Agreement, Winning Combination shall expressly indicate in a prominent manner that such goods and services are not available for purchase in the United States.

8. Winning Combination shall notify all resellers or distributors of its products that no goods or services bearing the HERBALEAN and HERBALEAN FX marks may be distributed in or imported into the United States.

9. If Winning Combination learns that one of its customers is using the HERBALEAN or HERBALEAN FX mark in the United States in violation of Sections 6(a) or 8 above, Winning Combination shall give NFI written notice.

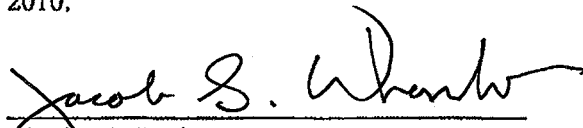
10. NFI and Winning Combination shall bear their own attorneys' fees and costs incurred in connection with this litigation.

11. In the event of any violation by NFI or Winning Combination of the terms of this Consent Judgment, the prevailing party will be entitled to an award of its reasonable attorneys' fees incurred in seeking to enforce this Consent Judgment.

12. This Court retains jurisdiction over NFI and Winning Combination for the purposes of enforcing this Consent Judgment and any action relating to the enforcement of this Consent Judgment.

13. NFI and Winning Combination waive their right to an appeal from or to otherwise contest this Consent Judgment, and this judgment may be entered without further notice to NFI or Winning Combination.

This the 28 day of December, 2010.



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The court directs entry of this judgment as there is no just reason for delay.

IT IS SO ORDERED this the 28 day of January 2011, .....

A handwritten signature in dark ink, appearing to read "W. Earl Britt", is written over a horizontal line.

The Honorable W. Earl Britt,  
Senior United States District Court Judge